

Thus, a court in a First Amendment retaliation case must ask two questions:

1. whether the employee's First Amendment-protected activity was a substantial or motivating factor in the adverse employment action; and
2. whether the employer would have reached the same decision even if the employee had not engaged in the constitutionally protected conduct.

77. Must a public school teacher salute the flag during a recitation of the Pledge of Allegiance?

Probably not. This answer stems from the landmark 1943 Supreme Court decision *West Virginia State Board of Education v. Barnette*, where the high court ruled that public school students had a First Amendment right not to salute the flag.¹⁸⁰

Even though the *Barnette* decision speaks directly about public school students, the same principles have been extended to teachers in subsequent decisions. In one case, a federal appeals court ruled that school officials violated the First Amendment rights of a public school arts teacher when they fired her for refusing to salute the flag.¹⁸¹ "We take guidance, instead," they ruled, "from the Supreme Court's instruction in *Tinker*, whose lesson is that neither students nor teachers 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"¹⁸² The court noted that the teacher did not "proselytize" her students but stood in respectful silence and that another teacher led the students in the pledge.

A teacher's right not to salute the flag, however, may not extend to all other exercises related to the school. In a case from the Seventh Circuit, for example, a Jehovah's Witness kindergarten teacher was fired when she informed the principal she could not teach any part of the curriculum that involved patriotic activities. Although one of these activities included saluting the flag, the teacher felt she must also not engage in prescribed elements of the curriculum involving patriotism, in any secular or religious holiday, or in the celebration of student birthdays. As the court ruled, "[t]here is a compelling state interest in the choice and adherence to a suitable curriculum. . . . It cannot be left to individual teachers to teach what they please."¹⁸³

78. May a teacher wear clothing not approved by a teacher dress code?

Probably not. The few published court decisions dealing with teacher dress codes have sided with school officials.

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